United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

74-2479

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

GREENE BERRY MULLENS,
Defendant-Appellee.

PETITION FOR REHEARING

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To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

The appellant herein petitions for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure for the reason that, in the opinion of petitioner, the District Court's decision and opinion, Criminal 1973-375 (W.D.N.Y. October 4, 1974), upon which this Court relied erred in a crucial premise to its decision and for the further reason that, in the opinion of the petitioner, this Court's decision, while not in immediate conflict with other decisions in this circuit and the United States Supreme Court, at least has the flavor of inconsistency.

The affidavit for the search warrant stated in relevant part:

> I have information based upon a reliable informant known to me for several years who in the past has given

> me information that has lead [sic] to arrest [sic] and convictions of other persons that he gave me information on, [sic] has informed me that the above named person residing at the above named address has several hundred $10.00 bills counterfeit that he is attempting to sell and pass the same. This informant gave information that led to the arrest and conviction of one Ronald Kohlman for bank robbery December 1971 Judge Curtin. Also that on December 5, 1973 informant did see a suit case [sic] with the said bills in it at the above address and in the possession of Barry Mullens.

(Appendix pp. 6-7). Citing to *Aguilar v. Texas*, 378 U.S. 108 (1964), the District Court for the Western District of New York held that that affidavit does not set forth a sufficient basis in fact for the informant's statement that the money was counterfeit, and so the warrant must fail.

On January 30, 1974, this Court affirmed the decision on the opinion rendered in the District Court.

The District Court's decision was rendered on its finding that:

> In the present affidavit, all that is stated is that "Berry Mullens . . . has several hundred ten dollar bills counterfeit . . ." The only fact upon which this statement could possibly be based is ". . . that on December 5, 1973 informant did see a suit case [sic] with the said bills in it at the above address and in the possession of Barry Mullens."

(Appendix p. 11). The Court is wrong. The affidavit further recites that Greene Berry Mullens "is attempting to sell and pass the [counterfeit bills]." Therefore, the appellant-petitioner submits that the informant, who was determined to be reliable by the District Court, (1) saw the counterfeit bills and (2) knew they were counterfeit because the defendant was attempting to sell and pass them.

The two prongs of *Aguilar, supra* and *Spinelli v. United States,* 393 U.S. 410 (1968), were meant as a refinement of, rather than replacement for, the probable cause standard articulated in *Brinegar v. United States,* 338 U.S. 160, 175-176 (1949) and *Carroll v. United States,* 267 U.S. 132, 162 (1925). The additional tests were necessary to meet the problems inherent in affidavits drawn in reliance upon information given by undisclosed informants. In terms of analysis, therefore, the first inquiry is whether the affidavit meets the normative probable cause standard; *i.e.,* whether the facts recited were sufficient to give rise to a reasonable belief that an offense had been committed. Once crystalized, the case involves (1) a reliable informant who (2) saw counterfeit bills in a suit case in the possession and residence of the defendant and who (3) stated that the defendant was attempting to sell and pass the counterfeit bills. The appellant-petitioner submits that the facts as articulated would warrant a reasonable man in the belief that criminal activity was occurring. Once over the probable cause hurdle, inquiry must be made into whether the *Aguilar* and *Spinelli* tests are met. The first test, the reliability of the informant is not an issue. Thus, the only remaining matter for inquiry is whether the judge issuing the warrant was "informed of some of the underlying circumstances from which the informant concluded" that the counterfeit bills were where he claimed they were. 378 U.S. at 114. The informant in the instant case saw the bills himself and he knew that the defendant was attempting to sell and pass them. Certainly these are sufficient "circumstances" to meet the remaining prong and distinguish *Spinelli.*

This last point was not fully set forth in the appellant's brief nor fully presented at oral argument, except as an afterthought. The informant, then, knew the bills were counterfeit because he saw the counterfeit bills in a suit case in the possession and residence of the defendant and knew the defendant was attempting to sell and pass them.

The countervailing argument is to say that there is no explanation in the affidavit as to how the informant knew that the defendant was attempting to sell and pass the bills. That response is identical with the Supreme Court's opinion in *Spinelli, supra.* By the informant's statement that he saw the bills in the possession of the defendant, the government is effectively through the *Spinelli* test. The reliance on the knowledge of the attempt to sell the counterfeit bills goes only to prove how the informant knew the bills were counterfeit. The appellant-petitioner submits that a secondary test, *i.e., that of knowledge of the nature of the bills does not require strict adherence to Spinelli.*

In *Jaben v. United States,* 381 U.S. 214 (1965), the Supreme Court noted that, "Some offenses are subject to putative establishment by blunt and concise factual allegations, *e.g.*, '*A* saw narcotics in *B's* possession . . .' "*Id.* at 223. The importance of this observation is that there is no mention that the "putative establishment" of the offense must include a statement of the method by which *A* determined that the substance was narcotics. Nor do subsequent cases establish a rule for demonstrating in the affidavit the method by which the informant determined the nature of the substance. See *e.g. United States v. Harris,* 403 U.S. 573 (1971); *McCray v. Illinois,* 386 U.S. 300 (1967). The formulation of such a requirement by the Supreme Court would appear unlikely in light of *Adams v. Williams,* 407 U.S. 143 (1972), where a stop and frisk was permitted on the tip of an undisclosed and untested informant.[1]

[1] Judge Friendly, in his dissent to the denial of *habeas corpus* by the Second Circuit Court of Appeals said:

> It is cause for no small wonder that in the first suppression hearing, Officer Connolly never mentioned the informer but said that he responded to a police signal. In the subsequent hearing the informer appeared and the signal disappeared.

(Footnote continued on following page)

While the collision of the instant case and other opinions of this Court are not immediate, at least there is the flavor of inconsistency. In *United States v. Freeman*, 358 F.2d 459 (2d Cir.), *cert. denied* 385 U.S. 382 (1966) the issuance of a warrant was upheld on the following facts: (1) the heroin was seen within the premises by a reliable informant, (2) on two days the informant saw the occupant of the premises meeting with known addicts and (3) the informant saw the narcotics transferred to the addicts. There was no indication of how the informant could identify heroin. *United States v. Gardner*, 436 F.2d 381 (2d Cir. 1971), upheld the validity of a search warrant predicated on a much more detailed affidavit than in the instant case, yet the affidavit nowhere demonstrated how the informant knew that the heroin was in fact heroin. *United States v. Counts*, 471 F.2d 422 (2d Cir.), *cert. denied* 411 U.S. 935 (1973), had at issue an affidavit based upon information from two reliable informants that defendant had heroin in his possession. Nowhere is there an indication of how the informants could identify heroin, yet the search was upheld. Finally, in *United States v. Lewis*, 392 F.2d 377 (2d Cir.), *cert. denied* 393 U.S. 891 (1968), a warrant to search for illicit alcohol was issued on the basis of the smell of mash and alcohol emanating from defendant's apartment. There is no indication in the opinion how the officers could identify the smell; rather, the Court of Appeals merely deferred to the issuing judge in the determination of the qualifications of the officers. Lastly, in *United States v. Gonzalez*, 488 F.2d 833 (2d Cir. 1973), this Court upheld the search of a safe deposit box subsequent to a narcotics arrest because the connection be-

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Williams v. Adams, 436 F.2d 30, 36 n4 (2d Cir. 1970) (Friendly, J., dissenting), vacated *en banc*, 441 F.2d 394 (2d Cir. 1971), *en banc* rev'd, 407 U.S. 145 (1972). If the Supreme Court made no provision for the contingency of fabrication in *Williams*, it seems unlikely that it would do so here where the informant is reliable. Rather, the issue of fabrication is better left to a factual hearing.

tween the box and the narcotics transaction could be "inferred from expert experience" *Id.* at 838.

The appellant-petitioner submits that the case law in the Circuit as set forth above parallels that in the Supreme Court since neither Court has, at least prior to this case, required an in depth showing of the qualifications of the informant in determining the content of the contraband.

For all of the foregoing reasons, it is respectfully urged that this Petition for Rehearing be granted.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: U. S. A.
v
Creene Berry Mullens
Docket No. 74-2479

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 13 day of March, 1975 I mailed 2 copies of a printed Petition in the above case, in a sealed, postpaid wrapper, to:

James L. Lalime, Esq.

1710 Liberty Bank Building

Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Roger P. Williams, Assistant U. S. Attorney

502 United States Courthouse, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

13 day of March, 1975

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 75